Lim Oh & Ors v Allen & Gledhill

FEDERAL COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02–18 OF 2000(W)

WAN ADNAN CJ (MALAYA), STEVE SHIM CJ (SABAH AND SARAWAK) AND MOHAMED DZAIDDIN FCJ

26 FEBRUARY 2001

Civil Procedure *— Abuse of process — Refiling of suit — First suit set aside for failure to comply with court order — Whether deliberate attempt to circumvent appeal procedure*

The appellants obtained leave to appeal to the Federal Court to determine the following issue: whether it was an abuse of the process of the court for the appellants to file a fresh suit when the first suit had been set aside for failure to comply with the procedural rules of the court. The main thrust of the appeal was an attack on the Court of Appeal's reliance on the authority of *Janov v Morris* [1981] 3 All ER 78. It was contended that the Court of Appeal had erred in failing to appreciate that *Janov v Morris* was confined to a situation where a plaintiff's action had been struck out for disobedience of a peremptory order of the court which was quite different from a situation where the plaintiff's action had been struck out for want of prosecution on account of his failure to comply with the rules of court.

Held, dismissing the appeal:

(1) The factual circumstances in the instant case clearly indicate that it was not a situation where there was a mere failure on the part of the appellants to comply with the rules of court because there was in existence a specific court order directing the appellants to effect the amendments in compliance with the Rules of the High Court 1980. It was in the nature of a peremptory order of the court and the appellants (as plaintiffs) had failed to comply with such a peremptory order (see p 485G–H).

(2) The appellants ought to have appealed against the decision striking out their first suit for disobedience of that peremptory order. The filing of the second suit, containing as it did, the same issues and reliefs as the first suit, amounted to a deliberate attempt to circumvent the necessary appeal procedure and therefore constituted an abuse of the process of the court (see p 486E–F).

[Bahasa Malaysia summary

Perayu-perayu telah mendapat kebenaran untuk membuat rayuan ke Mahkamah Persekutuan untuk menentukan persoalan-persoalan berikut: sama ada ia adalah penyalahgunaan proses mahkamah untuk perayu-perayu memfailkan satu guaman baru apabila guaman pertama telah diketepikan kerana gagal untuk mematuhi dengan peraturan-peraturan prosedur mahkamah. Teras utama rayuan

tersebut adalah satu bidasan terhadap kebergantungan Mahkamah Rayuan kepada autoriti *Janov v Morris* [1981] 3 All ER 78. Adalah ditegaskan bahawa Mahkamah Rayuan telah khilaf kerana gagal untuk menghargai bahawa *Janov v Morris* terbatas kepada satu keadaan di mana tindakan plaintif telah dibatalkan disebabkan keingkaran satu perintah muktamad mahkamah yang berbeza daripada satu keadaan di mana tindakan plaintif telah dibatalkan kerana tidak ada pendakwaan oleh sebab kegagalan beliau untuk mematuhi peraturan-peraturan mahkamah.

Diputuskan, menolak rayuan tersebut:

(1) Keadaan-keadaan faktual di dalam kes sekarang ini dengan jelas menandakan bahawa ia bukan satu keadaan di mana hanya terdapat kegagalan di pihak perayu-perayu untuk mematuhi peraturan-peraturan mahkamah kerana terdapat satu perintah khusus mahkamah yang mengarahkan perayu-perayu menurut pindaan-pindaan sebagai mematuhi Kaedah-Kaedah Mahkamah Tinggi 1980. Ia adalah sifat satu perintah muktamad mahkamah dan perayu-perayu (sebagai plaintif-plaintif) telah gagal untuk mematuhi perintah muktamad tersebut (lihat ms 485G–H).

(2) Perayu-perayu sepatutnya telah membuat rayuan terhadap keputusan membatalkan guaman mereka yang pertama kerana keingakaran perintah muktamad tersebut. Pemfailan guaman kedua, yang mengandungi persoalan-persoalan dan relif-relif yang sama, dikira sebagai satu percubaan yang disengajakan untuk memintas prosedur rayuan yang patut dan oleh itu membentuk satu penyalahgunaan proses mahkamah (lihat ms 486E–F).]

Notes

For a case on abuse of process, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) para 6.

Cases referred to

Bailey v Bailey & Anor [1983] 3 All ER 495 (refd)
Janov v Morris [1981] 3 All ER 78 (refd)

Legislation referred to

Rules of the High Court 1980 O 20 r 9

Appeal from: Civil Appeal No W–01–251 of 1994 (Court of Appeal, Kuala Lumpur)

Karpal Singh (*CT Lee* with him) (*Fernandez & Co*) for the appellants.
Chin Yew Meng (*A Vishnu Kumar*) (*Allen & Gledhill*) for the respondent.

Steve Shim CJ (Sabah and Sarawak) (delivering the judgment of the court):

The issues

This is an appeal by the appellants against the judgment of the Court of Appeal dated 7 October 1998. In the memorandum of appeal, the appellants have postulated the following propositions, namely:

(1) That the Court of Appeal erred in law in holding that there has been an abuse of the process of court by the appellants in bringing Suit No S1–22–102–1991 ('the second suit') against the respondent when the appellants' previous Suit No F22–262–1986 ('the first suit') had been set aside for failure to comply with the Rules of the High Court 1980 ('the RHC'); and

(2) That the Court of Appeal erred in law in holding that the appellants' first suit which was set aside for procedural non-compliance of the RHC is similar to a suit being struck off for failure to obey a peremptory order of the court, and this precluded the appellants from filing the second suit as being an abuse of the process of the court.

The above propositions have to be examined within the confines of the subject matter upon which leave to appeal was granted by the Federal Court, and that has been stated succinctly as follows: whether it was an abuse of the process of the court for the appellants to file a fresh suit when the first suit had been set aside for failure to comply with the procedural rules of the court.

The factual background

At the outset, it is pertinent to highlight the factual background relevant to the issues involved. On 2 May 1986, the appellants instituted an action vide Kuala Lumpur High Court Suit No F22–262–1986 ('the first suit') against one Low Kim Soon and Scot Leasing as the original defendants to the action. On 13 June 1988, the appellants filed an application to amend the writ of summons to include Allen & Gledhill ('the respondent') as a party to the action. On 24 January 1990, the above application for amendment was granted which would require the appellants to effect the said amendment within 14 days from the date of the order in compliance with O 20 r 9 of the RHC.

However, the appellants failed to do so. On 7 June 1990, the appellants obtained an order for leave to extend time to file their amended writ of summons and statement of claim to the first suit. Again, they failed to effect the said amendment within the prescribed period under the RHC. On 27 November 1990, when the respondent was served with the amended writ of summons and statement of claim, it took out an application to set aside the issuance of the said amended writ and statement of claim. On 16 January 1991, the learned senior assistant registrar ('the SAR') granted the said application. There was no appeal against the decision of the learned SAR.

Thereafter, on 12 March 1991, the appellants filed the second suit, against the respondent who then applied to strike it out on grounds of res judicata and/or issue estoppel and an abuse of the process of the court. On 3 April 1991, the above application was allowed by the learned SAR. The appellants appealed against the said decision to the High Court judge who allowed the appeal. The respondent, being dissatisfied with the decision of the High Court, lodged an appeal to the then Supreme Court. In allowing the appeal, the Supreme Court ordered a rehearing of the appellants' appeal from the learned SAR before a different judge. In consequence, on 12 August 1994, when the matter was heard before Mokhtar Sidin J (as he then was), the appellants' appeal was dismissed on the grounds that issue estoppel applied and hence, the filing of the second suit constituted an abuse of the process of the court. Against that decision, the appellants then filed an appeal to the Court of Appeal on 17 August 1994. On 20 August 1998, the Court of Appeal dismissed the said appeal essentially on the same grounds as the High Court judge. The appellants thereafter filed an application in the Federal Court for leave to appeal. Leave was granted but only on the issue which I have already stated.

The appellants' case

The main thrust of the appeal, as reflected in the submission of counsel for the appellants, is an attack on the Court of Appeal's reliance on the authority of *Janov v Morris* [1981] 3 All ER 78. Counsel contends that the Court of Appeal has erred in failing to appreciate that *Janov v Morris* is confined to a situation where a plaintiff's action has been struck out for disobedience of a peremptory order of the court which, according to him, is quite different from a situation where the plaintiff's action has been struck out for want of prosecution on account of his failure to comply with the rules of court. Here, he cites in support the case of *Bailey v Bailey & Anor* [1983] 3 All ER 495, drawing particular attention to the part under 'Held' which states:

> There was a fundamental distinction between the case where a plaintiff disobeyed a peremptory order of the court regarding the prosecution of an action and then commenced fresh proceedings within the limitation period raising the same cause of action, and the case where the plaintiff's action had been struck out for want of prosecution and he subsequently commenced fresh proceedings within the limitation period raising the same cause of action, since in the first case the plaintiff was in contempt and commencing the fresh proceedings constituted contumelious conduct which entitled the court to strike out the fresh proceedings, whereas in the second case the mere failure of the plaintiff to comply with the procedural rules of court in the first action did not prevent him commencing the fresh proceedings. Since the plaintiff's first action had been struck out for mere failure to observe the rules as to time and the second action had been commenced within the limitation period, the plaintiff was entitled to proceed with the second action.

Reference has also been made to Dunn LJ's observation in the above case when he said, inter alia:

> *Janov v Morries* was a case in which, in the first action there had bee a peremptory order of the court against the plaintiff which the plaintiff had failed to comply with, and accordingly had been guilty of what has been described in the authorities as contumelious conduct. It was on that ground that the first action in *Janov v Morris* was struck out. That has always hitherto been regarded as a different situation from the situation here, where the first action was dismissed for want of prosecution on the ground that there had been inexcusable delay in circumstances in which the conduct of the plaintiff could not be described as contumelious.
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> But counsel for the defendants, in seeing to uphold the order of the judge, submits that on principle there is no difference between the conduct of a plaintiff who deliberately disregards an order of the court, as was the position in *Janov v Morris*, and the conduct of a plaintiff who disregards the rules of court and takes no action within the rules, and who, in his submission is in the same position as somebody who deliberately disobeys an order of the court.
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> The difficulty about that submission is that, as I have said, there has always hitherto been a distinction between the situation where actions are struck out for disobedience of peremptory orders and where actions are dismissed for want of prosecution.

It is in the light of the above cited passages that the appellants take the view that *Janov v Morris* does not apply to the present case, which, according to them, concerns a situation where the first suit of the appellants had been struck out by the learned SAR for mere failure to comply with the procedural rules of court, ie O 20 r 9 of the RHC.

Conclusion

It is significant to note the following undisputed facts, namely, that there was an application by the appellants (as plaintiff) to amend their writ of summons and statement of claim to include the respondent as a defendant in the first suit; that in consequence thereof, the court made an order granting the said application, the effect of which would require the appellants (as plaintiffs), as a matter of course, to comply with O 20 r 9 of the RHC which stipulates that the amendment was to be made within 14 days from the date of the court order, otherwise the amendment would cease to have any effect; that the appellants had failed to effect the said amendment within the stipulated period and apparently without any explanation for such failure.

In our view, the factual circumstances in the instant case clearly indicates that it was not a situation where there was a mere failure on the part of the appellants to comply with the rules of court because quite obviously, there was in existence a specific court order directing the appellants to effect the amendments in compliance with the RHC. It was in the nature of a peremptory order of the court, and the appellants (as plaintiffs) failed to comply with such a peremptory order. In the circumstances, we must, with respect, disagree with the appellants' contention that the Court of Appeal had erred in failing to appreciate the ratio in *Janov v Morris* in the context of the factual situation in the present

case. In alluding to *Janov v Morris*, the Court of Appeal cited with approval the observation of Watkins LJ who said, inter alia:

> In the event of his action being ordered to be struck out for failure to obey a peremptory order, he may appeal against that order seeking, if necessary, an extension of time within which to do so. The outcome of such an appeal will to some extent depend on the excuse for failure preferably set forth in affidavit form provided for the court's consideration. If a litigant neglects to avail himself of that procedure and brings a fresh but precisely similar action to that ordered to be struck out, without any explanation then or at any later time for a failure to obey the peremptory order, he should not be surprised that the commencement of the second action is found to be an abuse of the process of the court and for that reason it, too, is struck out.

Thereafter, the Court of Appeal concluded, quite rightly, as follows:

> We agree that the filing of the second suit was an abuse of the process of the court since after having filed the first suit and obtained an order for its amendment, the appellants had admitted that the amendments were effected out of the prescribed period. When faced with the application to set aside the first suit, the appellants again failed to apply for an extension of time to enable the amendments to be effected. This raises the presumption that the appellants failed to comply with the rules of court. When the order striking out the first suit was made, the appellants could have appealed but failed to do so. The appellants felt that they could circumvent the need to appeal by instituting the second suit.

Given the view which we take that there was clearly in existence a peremptory order of the court, and that the learned SAR had struck the appellants' first suit out for disobedience of that peremptory order, we agree with the Court of Appeal's conclusion that the appellants ought to have appealed against that decision and that the filing of the second suit, containing as it did, the same issues and reliefs as the first suit, amounted to a deliberate attempt to circumvent the necessary appeal procedure and therefore constituted an abuse of the process of the court.

In the circumstances, given the position we have taken, we do not think it necessary to consider what appears to be an alternative stand canvassed by counsel for the respondent, that it was futile to permit the appellants to argue the issue upon which leave to appeal was granted, on the ground that it was academic and hypothetical in nature. In our view, it is sufficient, for the reasons stated, to answer in the affirmative, the question posed for our consideration. In the premises, this appeal is dismissed with costs. The deposit is to be paid to the respondent to account for taxed costs.

Appeal dismissed.

Reported by Jafisah Jaafar